Shaw's Supermarkets, Inc. *and* United Food and Commercial Workers Union, Local 791, AFL–CIO. Case 1–CA–38399

July 29, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND ACOSTA

On August 17, 2001, Administrative Law Judge Martin J. Linsky issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the administrative law judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

The judge ruled that the allegations that the Respondent refused to furnish information requested by the exclusive collective-bargaining representative should not be deferred to the grievance-arbitration provisions of the collective-bargaining agreement. We agree. The Board has a longstanding policy of nondeferral to arbitration in information request cases. See, e.g., *General Dynamics Corp.*, 270 NLRB 829, 829, 834–36 (1984). As the Supreme Court observed in *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 438 (1967), the policy of nondeferral in information request cases actually aids the functioning of the arbitration process, by allowing evaluation of the merits of the claim before placing the effort and expense of arbitration on the parties. See *DaimlerChrysler Corp. v. NLRB*, 288 F.3d 434, 444 (D.C. Cir. 2002); *NLRB v. American National Can Co.*, 924 F.2d 518 (4th Cir. 1991). Essentially the same rationale applies where a union seeks information to determine whether it should seek judicial enforcement of an arbitration award.

Citing *Malrite of Wisconsin*, 198 NLRB 241 (1972), the Respondent nevertheless contends that the Board should defer here because, in the Respondent's view, the Board's processes are being used to "enforce" an arbitration award. Although we agree that the Board's processes should not be used as a substitute for district court enforcement of an arbitration award under Section 301 of the Act,[3] we disagree with the Respondent's view of this case. Unlike the union in *Malrite*, the Union here is not requesting from the Board the same relief it already obtained from an arbitrator. Rather, in this case, the Union is simply seeking that the Respondent satisfy its independent obligation to furnish information concerning its implementation of an arbitrator's award. It is no answer to say that the Union could bring suit to enforce the arbitration award and then seek discovery of the requested information. The point of the request is precisely to determine whether enforcement litigation is warranted in the first place.

Our dissenting colleague asserts that the Board's policy of nondeferral to arbitration in information cases pertains only to cases involving prearbitration requests, and not to situations where, as here, the arbitrator has already issued a ruling on the merits. Our colleague fails to cite any precedent recognizing such a distinction, however, and we are aware of none.

Our colleague further asserts that it would be more efficient to defer to the arbitrator in postarbitration disputes over information than to "entangl[e]" the Board. But, as he acknowledges, deferral in such a situation runs the risk that the issue will not be resolved by the arbitrator, and that recourse to the Board may ultimately be necessary. Accordingly, although deferral might be more efficient from the point of the view of the Board, it does not advance the interest of the party requesting relevant and necessary information. We decline to impose the proposed two-tiered procedure in postarbitration cases.

Accordingly, we adopt the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by dilatorily providing requested information to the Union that was relevant and necessary to its role as the exclusive-bargaining representative of the unit employees.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Shaw's Supermarkets, Inc., Methuen, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

[1] Member Acosta notes that former Chairman Hurtgen, in his dissent in *Ormet Aluminum*, 335 NLRB 788 (2001), stated that matters involving information requests are better left to the processes of arbitration than to litigation before the NLRB, as they often involve contract interpretation issues in addition to the contractual issue underlying the grievance on its merits. Chairman Hurtgen also took the position that Sec. 8(a)(5) should not be used as a device to secure pretrial discovery in arbitration. Member Acosta observes that *Ormet* is distinguishable from the present case because here, the information request was made after the grievance had already gone through arbitration and an award had issued.

[2] We shall modify the judge's recommended Order and notice to conform to the requirements of *Indian Hills Care Center*, 321 NLRB 144 (1996), as revised in *Excel Container*, 325 NLRB 17 (1997). Furthermore, we will substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

[3] 29 U.S.C. § 185.

1. Substitute the following for paragraphs 2(a) and (b).

"(a) Furnish to the Union information that is relevant and necessary to the Union's role as the exclusive collective- bargaining representative of the unit employees.

"(b) Within 14 days after service by the Region, post at its facility in Methuen, Massachusetts, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 18, 2000."

2. Substitute the attached notice for that of the administrative law judge.

CHAIRMAN BATTISTA, dissenting

Contrary to my colleagues, I would not find that the Respondent violated Section 8(a)(1) and (5) by its alleged delay in providing the requested information to the Union. Rather, I would defer the dispute concerning this matter to the same arbitration process through which the parties agreed to resolve the merits of the underlying grievance.

The information request at issue in this proceeding consists of a list of questions seeking to determine the Respondent's compliance with an arbitration award. The award required that the Respondent match the 401(k) contributions of employees at its Methuen Distribution Center. Thus, the information request pertains directly to the arbitration process and the parties should attempt to resolve it through that mechanism.

The Board's general policy not to defer to arbitration in cases involving a request for grievance-related information stems from a concern that deferral will delay the ultimate determination of the grievance. *American National Can Co.*, 293 NLRB 901, 903 (1989), enfd. 924 F.2d 518 (4th Cir. 1991). By not deferring, the Board has sought to avoid the perceived inefficiency that could result from a two-tiered process involving an initial arbitration on the information issue and a second arbitration on the merits of the underlying contractual dispute. Id.

I do not pass on this Board policy of deferral in cases involving prearbitration information requests, for this is not such a case. Here, the arbitrator has already ruled on the merits of the grievance and has ordered a remedy. Thus, in a critical respect, this case differs from those in which the Board has applied its nondeferral policy. Because the information request here arose after the determination of the merits of the grievance, deferral could not possibly cause the delay of that determination that the Board's policy was designed to avoid. Contrary to my colleagues, I would not automatically extend the policy of nondeferral in one category of cases to a case involving significantly different circumstances.

My colleagues would have the Union go through a long Board proceeding to get the information.[1] The Union would then use that information to decide whether to seek judicial enforcement of the arbitrator's award in accordance with Section 301. In my view, the Union should simply go to the arbitrator to seek the information. If the arbitrator declines to consider the matter or resolves it in a way that the Union believes is inconsistent with its statutory right to relevant and necessary information, the Union may then avail itself of the Board's unfair labor practice procedure.[2]

NLRB v. Acme Industrial, 385 U.S. 432 (1967), is not to the contrary. The Supreme Court held there that the Board was not *required* to wait for an arbitral determination of the informational issue. The Court did not address the issue here, i.e., whether the Board, at its discretion could *choose* to have the matter resolved elsewhere.

In these circumstances, I find that entangling the Board in the dispute through an unfair labor practice proceeding, without first seeking the assistance of the arbitrator, adds (rather than eliminates) inefficiency. Although seeking the involvement of the arbitrator would not guarantee an immediate resolution of the information request in all cases, e.g., when the arbitrator declines to consider the matter, I believe that this approach would in many cases save the parties substantial time in obtaining a determination of that issue. In addition, it would avoid using the Board's resources for a dispute that could be resolved more expeditiously through another process. Accordingly, I would defer this case and similar cases to arbitration.

[1] The charge in this case was filed almost 3 years ago. Enforcement proceedings, if necessary still lie ahead.

[2] *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955).

Alternatively, the Union can seek enforcement of the award in Federal district court under Sec. 301. In the discovery phase of that proceeding, the Union could obtain the information sought in its request.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Chose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse or be dilatory in turning over requested information to the Union that is necessary and relevant to the Union in the discharge of its collective-bargaining responsibilities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL furnish requested information to the Union that is necessary and relevant to the Union in the discharge of its collective-bargaining responsibilities.

SHAW'S SUPERMARKETS, INC.

Rachael Splaine Rollins and *Laura A. Sacks, Esqs.*, for the General Counsel.

David E. Watson, Esq. (*Nutter, McClennen & Fish*), of Boston, Massachusetts, for the Respondent.

Warren H. Pyle, Esq. (*Pyle, Rome, Lichten, and Ehrenberg*), of Boston, Massachusetts, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On August 28, 2000, Food and Commercial Workers Union, Local 791, AFL–CIO (the Union or Charging Party) filed a charge against Shaw's Supermarkets, Inc. (Respondent) in Case 1–CA–38399.

On December 22, 2000, the National Labor Relations Board (the Board), by the Regional Director for Region 1, issued a complaint alleging that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) when it failed and refused to turn over certain requested information to the Union. Respondent filed an Answer in which it denied that it violated the Act in any way.

Thereafter, on April 10, 2001, the Board, again by the Regional Director for Region 1, issued an amended complaint alleging that Respondent violated Section 8(a)(1) and (5) of the Act when it failed and refused to turn over to the Union certain requested information. Again, Respondent filed an answer in which it denied that it violated the Act in any way.

A hearing was held before me on the amended complaint in Boston, Massachusetts, on April 24, 2001.

Based on the entire record in this case, including the posthearing briefs submitted by Counsel for the General Counsel and Respondent and upon my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times Respondent, a corporation, with an office and place of business in Methuen, Massachusetts, has been engaged in the operation of a chain of retail food stores in Massachusetts, Rhode Island, and Maine.

Respondent admits, and I find, that all material times the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

Negotiations over the Methuen Distribution Center between the Union and Respondent resulted in a collective–bargaining agreement effective on November 17, 1995. Article 40, section 3 of the collective–bargaining agreement involved Respondent's 401(k) plan. The relevant provision reads as follows:

> If the Company institutes an Employer match during the life of this agreement, the Company will give the Employees of Methuen the same terms and conditions of its implementation.

Between April 1997 and June 1998, the Respondent and Union negotiated a collective-bargaining agreement for Respondent's Wells, Maine Distribution Center. Late in the negotiations, the Union proposed a company match to the employees' 401(k) contributions. The Respondent agreed but stated that only the Wells, Maine Distribution Center employees would enjoy such a 401(k) agreement. A union representative and chief steward of the Methuen Distribution Center facility informed the Respondent that Methuen employees should also receive matching funds. At this point it became unclear to the Respondent whether it had agreed to such a term in the Methuen contract, and in October 1998, the Respondent stated definitively that it had not agreed and would not match Methuen employees' 401(k) contributions. In response, the Union filed a class action grievance asserting that Respondent had violated article 40, section 3 of the contract.

After the grievance was denied the Union voted to take the grievance to arbitration. Hearings were held on May 6 and December 5, 1999. On March 1, 2000, the arbitrator issued an opinion and award holding that:

> The Company violated Article 40, Section 3 by not giving bargaining unit employees at Methuen the same terms and conditions of participation in the 401(k) plan effective January

> 1, 1997, offered other employees. For the reasons stated above, the Company shall offer those employees the opportunity to participate in the plan and shall match contributions that have been made after May 1998 for employees who were enrolled on or before that date.

Later, upon the Union's unopposed request for clarification on March 20, 2000, the arbitrator ruled on July 26, 2000 that:

> Thus, with respect to the questions posed by the Union's March 20 letter: 1) the award was intended to apply to employees in the bargaining unit covered by Article 40 of the 1995–1999 contract; 2) the award does not specifically include or exclude employees who enroll after May 1998 from the Company match; 3) if the Company permitted employees at other stores and operations to enroll and participate in the matching component of the 401(k) plan after May 1998 the award would apply to such employees because they are entitled to the "same terms and conditions of its implementation."

Before receiving the arbitrator's clarified response, the Union's director of grievance and arbitration, Mary McClay, sent to Aenis Harris, Respondent's manager of labor relations, an information request, dated April 18, 2000. In its letter the union wrote:

> I am writing to you regarding [the aforementioned grievance] . . . from the Methuen Distribution Center. Would you please advise me what the Company has done to comply with the award dated March 1, 2000.
>
> Please identify the Methuen employees who were enrolled in the 401(k) plan as of May 1998. What has the Company done to match those contributions prior to May 1998?[1]
>
> Is the Company currently matching 401(k) contributions for the Methuen Distribution Center employees?
>
> Are the Methuen Distribution Center employees currently able to choose from the six (6) investment options?
>
> If you have any questions, please contact me at the Union office. Thank you in advance for your attention to this matter.

After receiving the arbitrator's clarification of July 26, 2000, the Union's attorney, Warren Pyle, sent another information request to Respondent. The second letter, dated August 8, 2000 was sent to Eric Nadworney, one of Respondent's vice president, and reads as follows:

> Now that we have the arbitrator's clarification of his award in this matter, Local 791 again requests that Shaw's provide the following information: The name of each employee who participated in the 401(k) plan and made contributions for the months beginning with June, 1998 to date, the amount of each such monthly contribution and the amount of each matching contribution to date and continuing.
>
> A response to Mary McClay's letter of April 18 to Aenis Harris is also due. I enclose a copy for you.
>
> Obviously, there are confidentiality concerns with such disclosures. I am prepared to discuss appropriate arrangements to that end.
>
> The Local reserves its right to seek full relief for any delays in contributions under the provisions of the ERISA statute.

The letters to Aenis Harris and Eric Nadworney were turned over to Hugh Penney, Respondent's vice president, compensation, benefits and human resources information systems.

The Respondent failed to act upon or reply in any way to the Union's information requests until April 18, 2001, when it turned over a portion of the requested information and April 18, 2001, I note, was just 6 days before the hearing before me and 1 year and 9 months, respectively, after the information requests. The rest of the requested information was turned over on May 4, 2001, some 10 days after the hearing before me. The Respondent never communicated to the Union prior to the hearing any justification whatever for its delayed response. I find that the Respondent violated Section 8(a)(1) and (5) of the Act, by failing to furnish the Union with information requested in a more timely fashion for the reasons that follow.

Under the Act, a labor organization, which has an obligation to represent employees in a bargaining unit, is entitled, upon request, to information relevant to and necessary for the performance of that duty. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). Where the information requested involves the terms and conditions of employment related to a union's bargaining unit employees, such as wages, 401(k) plans, etc., the information is presumptively relevant to the Union's representative function. *George Koch & Sons, Inc.*, 295 NLRB 695 (1989); *San Diego Newspaper Guild v. NLRB*, 548 F.2d 863 (9th Cir. 1977). In determining whether such information is relevant, the Board uses a liberal discovery-type standard. *NLRB v. Acme Industrial Co.*, supra; *W-L Molding Co.*, 272 NLRB 1239 (1984). And in *Ohio Power*, 216 NLRB 987 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976), the Board stated that, in evaluating the relevance of requested information that involves the terms and conditions of employment, the "standard of relevance is very broad, and no specific showing is normally required."

In the instant case, the Union's information request concerned details involving the Respondent's bargained-over 401(k) obligations to its employees. Since a 401(k) matching program is a form of compensation to an employer's work force, the information the Union requested was a term of employment related to the Union's bargaining unit. Therefore, the information the Union requested was relevant to the Union in its duty to its unit employees and should have been provided by the Respondent.

While the Respondent has not attempted to rebut the relevance of the Union's information requests, it has blamed its failure to comply on several different factors. Mainly, the Respondent suggests that much of the information requested was in the possession of a third-party Towers Perrin, and thus not readily available to the Respondent. Towers Perrin, a separate entity from Respondent, was the record keeper for all of Respondent's 401(k) plans and was responsible for calculating the amount of the Company's matching contribution for eligible

[1] The letter should read *after* and not *prior* to May 1998, and all parties recognized that this was a typographical error.

employees. However, Respondent's own witness, Hugh Penney, testified that most of the information could have been looked up in the payroll department and that much of the information was available through paystubs or quarterly 401(k) benefit statements, e.g., which employees were enrolled in the 401(k) plan, how many of the six investment options were available to them, and how much were they contributing to the 401(k) plan. The actual amount of the Company's match was calculated by an outside firm, Towers Perrin.

The Respondent also proffers more, even less persuasive, justifications for its failure to comply with the Union's requests. First, Respondent blames its refusal on high turnover in the Respondent's compensation, benefits, and human resources information systems department; second, it points to its unhappiness with the services provided by Towers Perrin; and last, it suggests that producing the documents would have been overly burdensome and costly. These arguments are unconvincing, though, as the Respondent's own witness Hugh Penney testified that most of the information was available to the Respondent and because none of these justifications were communicated to the Union until the hearing on April 24, 2001. And even if the Respondent did believe, upon receiving the information requests, that the requests were overly burdensome, it failed to explain this, or offer any other excuses, to the Union and bargain over a mutually satisfactory solution. *Lenox Hill Hospital*, 327 NLRB 1065 (1999). Overall, such a flagrant disregard of the Union's requests is inexcusable. *Keauhou Beach Hotel*, 298 NLRB 702 (1990).

Respondent suggests that the Union never pressed for the information once the requests were made but this is false. Indeed, on August 28, 2000, the Union filed a charge with the Region and Respondent's answer both to the original complaint and the amended complaint was that the material asked to be turned over was not necessary for and relevant to the Union in the discharge of its collective-bargaining responsibilities.

Respondent argues that the instant matter should be deferred to arbitration. While the 401(k) match is embodied in the collective-bargaining agreement, the Respondent's duty to provide information stems from the Act itself. It is well settled that allegations that an employer has refused to furnish information requested by an exclusive collective-bargaining representative are not deferred to arbitration. *IMTT-Bayonne*, 304 NLRB 476, 481 (1991); *United Technologies Corp.*, 274 NLRB 504, 505 (1985). Respondent fails to make a case that the Board should change this policy.

This case started out as a failure and refusal to turn over requested information to the Union. A portion of the requested information was turned over 1 week before the hearing and the rest was turned over 10 days after the hearing. Respondent's post hearing submission is admitted into evidence as Respondent's Exhibit 2.

The issue then is whether the Act was violated by the dilatory manner in which to requested information was turned over. Once a good faith demand is made for relevant information, it must be made available promptly and in useful form. Even though an employer has not expressly refused to furnish the information, its failure to make diligent effort to obtain or to provide the information "reasonably" promptly may be equated with a flat refusal. *NLRB v. John C. Swift Co.*, 124 NLRB 394 (1959), enfd. in part and denied in part 277 F.2d 641 (7th Cir. 1960). A long and unexplained delay in furnishing even partial information (9 months) has supported a conclusion that later bargaining was not in good faith, even though the company had expressly agreed to provide the information. *NLRB v. Fitzgerald Mills Corp.*, 133 NLRB 877 (1961), enfd. 313 F.2d 260 (2d Cir. 1963), cert. denied 375 U.S. 834 (1963).

Much of the requested information in the instant case Respondent possessed at the time of the request and some of the requested information Respondent would not have until furnished to it by Towers Perrin. Respondent was very slow in turning over the information it possessed and never notified the Union that there would be a delay in turning over the information it had to get from Towers Perrin. Clearly, Respondent engaged in bad faith bargaining.

REMEDY

Since the requested information has all been turned over the only remedy will be the issuance of a cease-and-desist order and the posting of an appropriate notice.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) and (5) of the Act when it was dilatory in turning over information requested by the Union that was relevant to and necessary for the Union in the discharge of its collective-bargaining responsibilities.

4. The unfair labor practice committed by Respondent effects commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

Respondent, Shaw's Supermarkets, Inc., Methuen, Massachusetts, its offices, agents, successors, and assigns shall

1. Cease and desist from

(a) Refusing or being dilatory in turning over to the Union information that is relevant and necessary to the Union's role as the exclusive collective-bargaining representative of the unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, furnish to the Union information that is relevant and necessary to the Union's role as the exclusive collective-bargaining representative of the unit employees.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Within 14 days after service by the Region post at its facility in Methuen, Massachusetts, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps should be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."